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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 779

HUNTINGTON PALISADES PROPERTY OWNERS CORPORATION, LTD.,

Petitioner,

vs.

METROPOLITAN FINANCE CORPORATION OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

The petition of Huntington Palisades Property Owners Corporation, Ltd., respectfully shows:

Summary of the Matter Involved.

This matter comes to this Honorable Court after affirmation by the Court of Appeals for the Ninth Circuit of judgments rendered in the District Court in an action in Declaratory Relief brought by Respondent-Grantee to determine the binding effect of restrictions on its lot, located in that common plan of residential development known as Huntington Palisades, in the exclusive residential area of West Los Angeles, California.

Petitioner is not only a successor in interest to the original seller, but its membership is also synonymous with all the *grantees* of record, including Respondent-Grantee, in the Huntington Palisades development. Petitioner's existence as a grantee property owners corporation, and as successor in interest to the seller, is provided for expressly in the original and all ultimate deeds of record [R. 18, 49].

The original and all subsequent deeds provide that the Petitioner, as successor in interest to seller, and as the combined grantees, shall operate positively and permanently through a property owners corporation, for the "maintenance, preservation and improvement of said properties" in the interest of all the grantees [R. 18, 49]. Petitioner's incorporation, its Articles and By-Laws, are all specifically provided for in the original deed and in all subsequent deeds; and Petitioner corporation was organized in accordance therewith [R. 53, 62].

Respondent has bought numerous lots in the Huntington Palisades development and has threatened to build houses thereon far below the standard of housing required in the deed and heretofore built upon the improved property in the Huntington Palisades.

On the 12th day of August, 1926, the original grantors granted to one Percy W. Rairden, Respondent's remote predecessor in title, the particular lot in question, as the part of a common scheme or plan of development, whereby the area would be retained for exclusive residential purposes. Among many restrictions, reservations, covenants and servitudes inserted into the original deed and made a part of the Rairden deed and of all subsequent deeds, was the requirement that no house should be built upon Respondent's lot of less than five hundred (500) square

feet, nor less than the value of eight thousand ($8,000.00) dollars [R. 8 *et seq.*, 39 *et seq.*].

It was specifically provided in all deeds that Petitioner property owners corporation, representing all grantees in the tract, would have the specific right and the *positive duty to maintain, preserve, and improve the properties*, in the interest of *all* the grantees [R. 18, 49]. The wording of the original deed and all subsequent deeds is quite broad enough, in the belief of Petitioner, to authorize the Petitioner property owners corporation, representing the grantees, to enforce all equitable servitudes necessarily pertaining to *preserving, improving*, and *maintaining* the premises of this beautiful residential area. Respondent maintained in the Court below that any such authority in Petitioner would amount to authority to modify the restrictions and covenants of the original deed.

Petitioner contends that this is not *modification* of restrictions. It is, rather, but positive action to *maintain* and *preserve* and *improve* the beautiful Huntington Palisades as an exclusive residential area; and that such positive action was fully contemplated by all parties to all the deeds, and fully authorized therein.

Furthermore, if it *is* modification, such authority in Petitioner, as representative of all *grantees*, is *not* contrary to the policy of the law; but, rather, is in furtherance of it, *because of the unique nature of the relationship of the parties in this unusual plan of development.*

This unique relationship between the parties presents an important question of law of considerable general interest throughout the United States. But of perhaps even more general importance is the question of the arbitrary exercise of judicial power and the departure from generally ac-

cepted practice under the Federal Rules of Civil Procedure, which has been sanctioned by the Court of Appeals for the Ninth Circuit in this matter.

The dispute herein arose some five years after Respondent had purchased its lot. It purchased its lot in 1943 with full notice of the covenants, restrictions and equitable servitudes found in the original deed and its own deed, and with full knowledge of the authority granted therein to Petitioner corporation to take necessary action to preserve and maintain the collective rights of grantees in the development, and with full knowledge of the authority of said grantee's corporation so to act, as expressed in its Articles of Incorporation and By-Laws [R. 53, 62, 77, 78, 79, 80, 81].

Ir 1944, Respondent, as grantee, voluntarily became a member of Petitioner corporation, and became thereby entitled to the benefits and obligations of such membership [R. 77, 78, 79, 80, 81]. Petitioner corporation on or about the 17th day of February, 1945, following a full discussion on the matter, did lawfully adopt a new square footage restriction, in the place of dollar valuation restrictions then existing, including the lot of Respondent-Grantee [R. 33, 81]. Petitioner did so because of the decreased value of the dollar and the imminent danger that some persons acquiring possession of lots in the development might, through a legal technicality in regard to the dollar restriction, attempt to build residences of inferior quality to that found elsewhere in Huntington Palisades.

To prevent such an injustice from developing, and in order to *maintain and preserve and improve the properties,* the *grantees* exercised their authority through their representative, the Petitioner corporation, to prevent the build-

ing of cheap dwellings. Petitioner, in order that no inequitable results would take place, made a careful, thorough and reasonable study of conditions in the year 1925 as compared to conditions on or about February, 1945, in order to arrive at what would be a proper square footage restriction in terms of what would have been the square footage restriction on the same dollar valuation at the time the original deed was drawn. In other words, Petitioner corporation did not seek actually to modify or change the restrictions on the quality and size of the houses to be constructed, but merely to *maintain, preserve and improve* the quality and size of houses to be constructed at the same level as existed at the time the restrictions were included in the deed.

Thereafter, and for some three years following February 17, 1945, Respondent-Grantee did *acquiesce in, benefit by* and *accept* the action of the Board of Directors of Petitioner-Grantee corporation of February 17, 1945 [R. 77, 78, 79, 80, 81, 34]. It was not until the 5th of February, 1948, that Respondent-Grantee did request, by letter, an alteration of the square footage restrictions.

In the meantime, numerous other property owners, also members of Petitioner, were required to conform to the square footage restrictions and many were grantees who bought, and *retained,* their property in full reliance upon the restrictions in all the deeds *and* upon the square footage restrictions effectuated by the positive actions authorized under the original deed and taken by Petitioner corporation.

Thereafter, on August 11, 1948, Respondent-Grantee brought action in Declaratory Relief in the District Court to have the action of Petitioner corporation of February

17, 1945, declared null and void as to Respondent-Grantee, and narrowly to limit all restrictions, covenants, reservations and equitable servitudes to those found in the original deed of record at the time of purchase of the lot in dispute [R. 2]. The Respondent in its Complaint [R. 2] pleaded jurisdiction in the Federal District Court in that it is a citizen of the State of Delaware, and Petitioner herein is a citizen of the State of California, and that the matter in controversy, exclusive of interest and costs, exceeded the sum of three thousand ($3,000.00) dollars.

Petitioner property owners corporation, representing *all* the grantees in the tract, brought a counterclaim action [labeled "Amended Cross-Complaint," R. 24] requesting an injunction to prevent Respondent from building inferior housing in the Huntington Palisades area on the lot in question; to require Respondent to pay proper and reasonable fees to Petitioner's Architectural Committee; to require Respondent otherwise to conform with the restrictions, reservations, covenants, and equitable servitudes of the original and subsequent deeds of record and as expressed in the authorized actions of Petitioner property owners corporation representing all grantees in the Huntington Palisades; to declare Respondent-Grantee *estopped* to deny the actions taken by Petitioner for Respondent-Grantee's benefit and to its knowledge seriously relied upon by others; and to declare Respondent bound by equitable covenants apart from the deed relationship, and also by contractual relationships entered into subsequent to the deed.

The Federal District Court granted Respondent's Motion to Dismiss Petitioner's counterclaim [R. 86] on the ground that it stated no claim upon which relief could be granted! And then, *while an appeal was pending on this Motion* [R. 88], went on to hear, and to grant, Respondent's request for a Summary Judgment against Petitioner on the main cause [R. 107]!

Petitioner appealed from both actions of the District Court, both in the granting of the Motion to Dismiss its counterclaim and the granting to Respondent of a Summary Judgment [R. 88, 109].

Both actions were taken without hearing evidence on any of the issues in the case raised by the relationship of the parties *apart* from the deed; and this in fields of equity in which *the facts* are overwhelmingly considered to be determinative of the rights of the parties!

The combined effect of both Judgments was arbitrarily to deny the Petitioner due process of law in the Federal Courts in that the dismissal of the counterclaim, and the summary judgment on the main cause, improperly and arbitrarily disposed of issues of material fact, *apart from the deed relationship,* raised by the pleadings, in direct disregard of the Federal Rules of Civil Procedure and decisions of the Court of Appeals for the Ninth Circuit and of this Honorable Court in relationship thereto.

On February 7, 1950, the United States Court of Appeals for the Ninth Circuit affirmed both Judgments of the Federal District Court [R. 121].

Jurisdiction of the Supreme Court.

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 7, 1950 [R. 121]. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

Questions Presented.

(1) Where answer and counterclaim, separately, or taken together, state a cause or causes of action, and affidavits in opposition thereto do not resolve the issues raised by said pleadings, can the Federal District Court, without a trial, properly dismiss either of said pleadings and grant Motion for Summary Judgment on the remaining one?

(2) Where factual relationship of the parties to a deed has created new and wholly different legal relationships than those for which there is applicable local law, may the Federal District Court arbitrarily apply inapplicable local decisions to achieve a technically correct result that is conducive to unjust enrichment and is violative of fundamental principles of justice and due process of law? Or, rather, must said Court exercise its judicial function by seeking and applying legal principles which are applicable to these new fact situations and do not violate the ends of fundamental justice?

(3) May the Federal Trial Court arbitrarily segregate interrelated pleadings in a summary proceedings, and thus dispose of litigation in piecemeal fashion, when, had those interrelated pleadings been properly read together, summary proceedings would have been improper?

Reasons for Allowance of Writ.

1. The decision of the Court of Appeals is in conflict with the following applicable decisions of the Supreme Court.

(a) Where issues of disputed material fact are raised by the pleadings, and supporting affidavits do not resolve those issues, granting of Motion for Summary Judgment is improper.

Sartor v. Arkansas Natural Gas Corporation, 321 U. S. 620, 627;

Associated Press v. The United States, 326 U. S. 1, at 6;

Kennedy v. Silas Mason Co., 334 U. S. 249.

2. A wholly new and different legal relationship exists between Petitioner and Respondent than can be determined by the strict application of local decisions in regard to deed restrictions; and this new and different legal relationship is of such general importance as to merit the careful consideration of this Honorable Court.

(a) There are no known cases dealing expressly with the positive functioning of a perpetual organization of property owners in maintaining and preserving their collective property by *positive* enforcement of deed restrictions in relationship thereto.

(b) Positive action by the Petitioner, in accordance with powers given it under the deed, to enforce the deed restrictions is not necessarily a modification of the deed within the meaning of the California cases.

Burkhardt v. Loften, 63 Cal. App. 2d 230, 146 P. 2d 720.

(c) Even were the positive enforcement of the deed restrictions to be interpreted as a modification of the deed, that modification does not necessarily void the deed or the enforcement of the restrictions.

Burkhardt v. Lofton, 63 Cal. App. 2d 230, 146 P. 2d 720;

Stein v. Endres Home Builders, Inc., 228 Wis. 620, 280 N. W. 316.

(d) It was error for the Court of Appeals to sanction the application of the following cases as direct authority for settling the problems raised by the new and different legal relationship which exists between Petitioner and Respondent.

Werner v. Graham, 181 Cal. 174, 181, 183 Pac. 945;

Farquharson v. Scoble, 38 Cal. App. 680, 683, 177 Pac. 310;

Grant Memorial Park, Inc., vs. Robla School District, 33 Cal. App. 2d 528, 92 P. 2d 499;

Berryman v. Hotel Savoy Co., 160 Cal. 559 at 566, 117 Pac. 677;

Firth v. Marovich, 160 Cal. 257;

Wing v. Forest Lawn Cemtery Association, 15 Cal. 2d 472;

Russell Realty Co. v. Hall, Tex. Civ. App. (1921), 233 S. W. 996;

Fritz v. Been, 199 Ga. 783, 35 S. E. 2d 513, 161 A. L. R. 124.

(e) The only local decisions which remotely approach settlement of the issues between Respondent and Peti-

tioner in regard to the deed restrictions are the following cases, both of which support Petitioner's position:

Burkhardt v. Lofton, 63 Cal. App. 2d 230, 146 P. 2d 720;

Stein v. Endres Home Builders, Inc., 228 Wis. 620, 280 N. W. 316.

3. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned a departure by the Federal District Court, as to call for an exercise of this Court's supervision.

(a) Disputed issues of material fact as to the existence of covenants running with the land in equity, a contractual relationship *apart from the deed* and an estoppel *apart from the deed,* were raised by the pleadings which made it improper for the Federal District Court to dismiss Petitioner's counterclaim and to grant Respondent's Motion for Summary Judgment on the main cause, and for the Court of Appeals to sanction such procedure in the Federal District Court [R. 77 to 81, 53 to 56, 29 to 36, 99 to 184, 24 to 36].

Sartor v. Arkansas Natural Gas Corporation, 321 U. S. 620, 627;

Federal Rules of Civil Procedure, Rules 56-C, 8, 56-A, 8-C, 54-B;

Lane Bryant, Inc., v. Maternity Lane Ltd. of California, 173 F. 2d 559.

(b) It was improper procedure for the Federal District Court to tear Petitioner's counterclaim apart from the remainder of the case and dispose of it in piecemeal fashion, and then, while an appeal was pending thereon, in like

fashion dispose of the main cause, said main cause and counterclaim being inextricably interrelated.

Federal Rules of Civil Procedure, Rules 13-I, 54-B, 56, 8-C, 42-B;

Associate Discount Corp. v. Crow, 110 F. 2d 126.

I.
The Deed Relationship.

The apparent, and stated, basis for both judgments by the District Court was: "failure to state a claim upon which relief could be granted."

Petitioner contends that the District Court erroneously interpreted the Deed and the law applicable thereto, in determining that Petitioner thereby could not state a cause of action under the Deed relationship between the parties which would justify its enforcement of the restrictions on Respondent's lot.

Recent cases have expressed a view contrary to the general view in the past, which had been that the reservation in the grantor of the right to modify or change restrictions in the deeds was void because such reservation would mean that the grantor by retaining for himself sufficient power to change or modify, was not granting full fee simple estate. Thus equitable servitudes cannot ordinarily be created where there is such reservation on the part of the grantor of the right to modify.

Rose v. Jasima Realty Corp., 218 App. Div. 646, 219 N. Y. Supp. 222.

However, a contrary conclusion was reached in 1944 in *Burkhardt v. Lofton,* 63 Cal. App. 2d 230, 146 P. 2d 720, and in 1938 in *Stein v. Endres Home Builders, Inc.,* 228 Wis. 620, 280 N. W. 316. It would seem from these cases that the general view against the right to modify restrictions is *not* a rule of *absolute application,* but can properly be withheld from application *where the facts* justify it. In the case on appeal before this Court there has been no finding of facts because there has been no trial!

In the *Burkhardt* case, *supra,* it is true the right to modify had not been exercised; but the Court sustained the equitable servitude in the deed against the charge that the reservation of the right to modify in itself prevented the creation of the servitude (63 Cal. App. 2d 230, at 233).

In *Stein v. Endres Home Builders, Inc., supra,* the Court was faced squarely with the reserved right of the grantor to dispense with the condition in question. The Court held that equitable servitudes were created nevertheless.

It is appropriate to note the dissent to the modern view of the Wisconsin Court in the *Stein v. Endres etc.* case (280 N. W. 316, at 320). While the judgment is cited in support of Petitioner's view of the right to modify, *the dissent* to that judgment by no means works against Petitioner's cause. Chief Justice Rosenberry, dissenting, clearly expresses the theory behind the general view opposed to the reservation in deeds of the right to modify the restrictions therein. He says:

> "The reservation of a right to dispense with the condition is inconsistent with an intention that the

> restriction should be *for the benefit of subsequent grantees.* In my opinion the restriction was solely for the benefit of the grantors . . . (Italics ours.)"

Petitioner has no quarrel with that general rule and with the sound equitable and legal principles underlying it. *But,* Petitioner is certain that an examination of the facts in the instant case will reveal that the "general rule" of the dissent in the Wisconsin case has *no application here.*

Here, the reservation of the right to modify the restrictions (if "maintenance, preservation, and improvement" be so interpreted) in the deed is *not* a reservation in the *grantor.*

The reservation, if any, is in *all the grantees* in the Huntington Palisades development. The Petitioner *is* the grantees, acting in their united corporate capacity, and overwhelmingly approving Petitioner's actions [Tr. pp. 101-104].

Chief Justice Rosenberry, arguing in his dissent for the strict application of the general rule, cites *Rose v. Jasima Realty Corp., supra,* as saying: "A covenant which the *grantor* (italics ours) may cancel at will cannot be for the benefit of anyone but himself." The theory behind the objection of the "general rule" thus being that the reservation *in the grantor* of the right to alter restrictions is inconsistent with the requirement for an equitable servitude that there exist an intention in the grantor's deed to benefit the other owners of lots in the development plan.

In the case now on appeal before this Court, there is *no such inconsistency.* The right to alter is reserved by all

the deeds *in the grantees.* The entire plan of development, as provided for in the deeds, is specifically aimed at *benefiting the grantees.*

The general rule against reservation in deeds of the right to alter restrictions has no applicability to this case.

Nor is the recent California case of *Wing v. Forest Lawn Cemetery Assn.,* 15 Cal. 2d 472, 101 P. 2d 1099, cited by Respondent in the District Court [Tr. p. 83], in disagreement with this view. That case is readily distinguishable on the facts. Indeed, when its facts are analyzed, it *supports* Petitioner's case! There, an immediate grantee of a cemetery lot was trying to change the meaning of the deed to create an equitable servitude which would prevent its immediate grantor from operating a funeral establishment on the premises.

As the Court pointed out, and as the California Court also noted in the *Burkhardt* case, *supra,* 63 Cal. App. 2d 230, at 234, in the *Wing* case there never was any equitable servitude created because the deed contained no designation of a dominant tenement. Hence, in the *Wing* case, under the rule of *Werner v. Graham,* 181 Cal. 174, 183 Pac. 945, 948, there was no possibility of arguing for an equitable servitude.

In the instant case, the deed clearly describes the dominant tenements as being in all the grantees, acting in their corporate capacity as the Petitioner [Tr. pp. 17-20 and 47-51].

Thus, it seems clear that it was error on the part of the District Court and the Court of Appeals to construe the meaning of "maintenance, preservation and improvement" as mere authority to clear up rubbish; it was error to hold that any broader meaning would amount to an

authority reserved in the grantor to alter the restrictions in the deed; it was error to hold that even if the broader meaning did authorize a reserved right to alter restrictions in the deed that such reserved right is, *in this fact situation,* as described in the deed, contrary to the policy of the law.

It is *not* contrary to such policy, for the right to alter, if such it is, is here reserved *not in the grantor* but in *all the grantees* acting collectively for their individual benefit.

Respondent-Grantee bought a piece of property with certain specific restrictions on its use in the deeds of record. These *included* a clear grant of power to an organization, of which itself was a member, to make those restrictions *effective.* There is nothing in the policy of the law to oppose such a purpose, where the parties are in the relationship they are in this dispute. Therefore, only where *the facts* indicate an inequitable result should Respondent be allowed to avoid that purpose. Here the facts *were not,* and *could not* be, made available to the District Court because it granted a *Summary* Judgment.

However, the interpretation of the Deed and the applicable law *may* have been a matter of law within the province of the trial Judge's discretion. But, if so, Petitioner urges that the trial Judge, at the very least, erred in exercising his discretion, in that regard.

Of more fundamental importance than the Deed relationship between the parties, is that relationship which arose between the parties during a period of over three years and which was entirely separate and apart from the Deed. The trial court completely ignored this relationship.

II.

Relationship of the Parties Apart From the Deed.

In Petitioner's pleadings in the record before the District Court and the Court of Appeals, there were clear allegations of the existence of a contractual relationship between these parties. The existence or non-existence of such a contract is the matter of factual dispute between these parties; it is no "mere matter of law" for the trial court's summary disposition.[1]

Petitioner's Amended Counterclaim, under the liberal rules of construction which are the whole purpose behind the Federal Rules of Civil Procedure, clearly discloses an aggregate of factual relationships between these parties arguing for the existence of such a contract. Testimony, correspondence, documentary evidence would *prove* the existence of such a contract binding Respondent to abide by the restrictions to which it now objects.

But, the trial court allowed no opportunity for the introduction of such evidence, or the cross-examination of witnesses, or any of the other safeguards of a fair trial —a day in court.

Instead, the District Court granted Respondent's Motion to Dismiss the Amended Counterclaim . . . refusing, in doing so, to consider anything but the deed relationship . . . and thereby failing to recognize the contractual relationship alleged to exist between the parties.

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[1]*Lane Bryant, Inc. v. Maternity Lane Ltd. of California,* 173 F. 2d 559, by the Court of Appeals herein, is authority for the proposition that summary judgment may not be granted where the affidavit of the moving party (as herein) merely presents *evidence* upon material issues and does not show there are *no* material issues.

And the Court of Appeals has sanctioned this clear departure from established judicial procedure.

Furthermore, and also entirely aside from the relationship created by the Deed, there is the relationship between Respondent and the numerous individual property owners who are members of Petitioner's organization. Failure to recognize this relationship can only result in the unjust enrichment of Respondent.

During a period of over three years, as alleged in Petitioner's Amended Counterclaim [R. 30-36], Respondent so acted as to *estop* it from objecting to the restrictions on its lot.

The District Court failed to recognize the clear and express allegations of the existence of an estoppel, the *factual* existence of which Petitioner could have proved, had it been allowed to go to trial.

But the District Court did not allow such a trial! It granted judgment dismissing Petitioner's Counterclaim for failure to state a claim on which relief could be granted!

Clearly, the Counterclaim alleged a *contract* to exist between the parties on which relief could have been granted [R. 30-36]. *Therefore,* it was error for the District Court to have entered its *first judgment* dismissing the Counterclaim.

Clearly, also, the Counterclaim alleged the existence of an estoppel.

In the Federal Rules of Civil Procedure, Rule 8(c), *estoppel* is listed as one of those *affirmative defenses* which it is the *duty* of the trial court, under that rule, to include as part of the defense to the complaint, even though

the estoppel was improperly designated as a Counterclaim [Appendix, p. 2].

Therefore, it was error for the Court not to include the *estoppel* element of the Counterclaim as part of Petitioner's Answer to Respondent's Complaint.

Had the trial judge properly so included the estoppel element as part of Petitioner's Answer, then it could not have granted its *second judgment*. For it is the clear purport of the rules, and the cases thereon, that Summary Judgment cannot be granted where there is any dispute as to material facts.[2]

The allegation of an estoppel immediately puts in issue disputed facts.

Therefore, it was error for the Court to grant either of its two judgments.

It was error to grant the Motion to Dismiss the Amended Counterclaim, because of the allegations of contract.

It was error to grant the Motion for Summary Judgment on the main cause, because Petitioner's Answer—its defense to Respondent's Complaint for Declaratory Relief —necessarily included allegations of facts raising an estoppel, even though these allegations were erroneously found designated as a Counterclaim.

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[2]*Federal Rules of Civil Procedure*, Rule 56, Appendix, pp. 5-6; *Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620; *Associated Press v. The United States*, 326 U. S. 1, 6. Nor may summary judgment be granted where affirmative defenses raise issues of fact, *Butcher v. United Elec. Coal Companies*, 174 F. 2d 1003 (C. A. 7th, 1949).

Respondent argued in the Court of Appeals:

> "The purpose of a summary judgment has so long been established and understood that no citation of authority should be necessary to support the proposition that if upon the motion no genuine issue as to any material fact is presented, the motion should be granted."

Petitioner has *no* argument against that proposition. However, Petitioner strongly contends that the Respondent's attempt to apply that proposition to the facts of this case is completely erroneous. *Christianson et al. v. Gaines,* 174 F. 2d 534 at page 536, is among the numerous cases which are clear authority for the proposition that rule 56(c) of Federal Rules of Civil Procedure must be read in conjunction with Rule 8. Otherwise, it is noted, the provisions in Rule 56 for Motion for Summary Judgment would be completely indistinguishable from a Motion to Dismiss, and Rule 56 a nullity.

Thus, if Rule 8 is to be read with Rule 56(c) in determining whether a Motion for Summary Judgment is proper, then, certainly, the Motion for Summary Judgment was improperly granted in this case. Certainly the Amended Counterclaim of Petitioner herein contained the essential elements of an estoppel aside from other causes of action. If so, and if Rule 8 requires that an estoppel be raised as an affirmative defense, and further requires that where it is improperly raised in a Counterclaim it should be included (for the purpose of determining whether a Motion for Summary Judgment should be granted) as an affirmative defense, notwithstanding its lack of proper designation as such, then certainly Peti-

tioner's Counterclaim herein should, "justice so requiring" in the words of Rule 8(c), have been found by the trial court to raise issues of disputed material fact and hence have prevented the granting of Motion for Summary Judgment.

In this regard, it is interesting to look at the United States Supreme Court case of *Sartor v. Arkansas Natural Gas Corporation* (321 U. S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967). In that case, in 1944, the Supreme Court of the United States held that the granting of a motion for Summary Judgment was improper where there was any slight evidence of a disputed fact. In that case, the matter had been tried twice in the District Court and adjudicated twice in the Court of Appeals. The precise fact question in dispute was whether or not during a relevant period of time, natural gas sold at 3¢ or a lesser amount. If it sold at a lesser amount, the Motion for Summary Judgment against Plaintiff was proper. If it sold at 3¢ or more, then Plaintiff did have a good cause of action and Motion for Summary Judgment was not proper. Not only had all of the Affidavits of the moving party showed that the gas had sold at less than 3¢ and, therefore, that Plaintiff had been properly compensated already, but, also, practically all of the stipulations, documentary evidence, and, in fact, the specific findings of one of the District Courts after full trial, had determined such to be the case. Nevertheless, this Honorable Court reversed the granting of the Motion for Summary Judgment, saying in part (88 L. Ed. at page 972):

> "The Court of Appeals below heretofore has clearly noted that Rule 56 authorizes Summary Judgment only where the moving party is entitled to Judgment

> as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial . . .",

and again at page 973:

> "We think the defendant failed to show that it is entitled to Judgment as a matter of law. In the stipulation, the bulletin, the affidavit of the Plaitniff's attorney and the admission of its witnesses, there is *some, although far from conclusive, evidence* of a market price or a value, under the rules laid down by the court of appeals, that supports plaintiff's case. *It may well be* that the weight of the evidence would be found on a trial to be with the *defendant*. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given their opinions is to be determined, after trial, in the regular manner. The Judgment is accordingly reversed."

In other words, the Supreme Court of the United States, looking to a case in which the specific fact matter had been determined by the trial court in one trial, and in which a multitude of affidavits, stipulations etc. supported the District Court, in the second trial, in granting Motion for Summary Judgment, nevertheless determined that there was *some slight claim* of a disputed fact issue. There being some slight claim, even though it seemed probable it would not stand against the overwhelming weight of testimony and evidence against it in a trial, nevertheless, that small claim, such as it was, was sufficient for the Supreme Court of the United States to determine that a Summary Judgment was improperly granted.

In the instant case, there has never been a trial of *any* of the fact issues of the dispute between the Petitioner and Respondent. Petitioner has never had the opportunity of proving to the trial court the circumstances of an estoppel, or of a contract, or a covenant running with the land in equity apart from the Deed or any of the other matters it has raised by its pleadings. It has had no opportunity to cross-examine Respondent's witnesses, nor to present to the court its *own* testimony and documentary evidence in a regular and proper fashion.

Certainly, if Rule 8 is read in conjunction with Rule 56, as seems to be the unquestioned rule in regard to Federal Procedure, then certainly the Amended Cross-Complaint, by raising the issues of estoppel, presented to the trial court, a matter which the trial court, in all justice, should have included as part of the Answer, as an affirmative defense. If so, then there were a host of disputed fact issues as to the existence or non-existence of an estoppel. This alone made it error for the trial court to grant Summary Judgment.[3]

Not only is the estoppel issue an affirmative defense to Respondent's complaint in the court below, which is entirely apart from the Deed relationships, and therefore not a mere matter of law which the trial court could dispose of in its discretion; but, furthermore, Petitioner's Amended Counter-Claim raised in the court below the

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[3]The Court of Appeals [R. 138] cites a number of cases holding that "There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title."; and [R. 139] says "There is no possible claim as to any turpitude on behalf of plaintiff." Is the deliberate buying-up of lots in a restricted residential area for the express purpose of violating those restrictions by building substandard housing, while accepting and acquiescing in the restrictive measures which make those lots highly desirable and the more readily sale-able, not an element of turpitude?

issue of a covenant running with the land in equity, entirely apart from the Deed, and also raised in the court below, the issue of the existence or non-existence of a contractual relationship between the parties, entirely apart from the Deed. There has been no opportunity to present evidence in regard to these issues; there has been no opportunity to cross-examine Respondent's witnesses, or to present Petitioner's own witnesses. There has been no trial of *any* of the issues of dispute between these parties, apart from that raised by the deed.

Furthermore, the pleadings of Petitioner and Respondent clearly raised as an issue, the matter of assessment, by Petitioner's Architectural Committee, of reasonable fees for inspecting and approving architectural plans submitted to it by member property owners of Petitioner property owners' corporation. Respondent objected to the payment of any such reasonable fees on the ground that they were assessments in addition to the five mills per square foot per year provided for, for general purposes, in the Deed. Petitioner contended that they were merely reasonable service charges for services performed; and were definitely not improper charges under the Deed. If the court will note, the trial court in this instance in both its judgments handed down below, has completely avoided this issue [R. 86, 107]. Neither the Judgment granting Respondent's Motion to Dismiss the Amended Counter-Claim of Petitioner nor its later judgment in granting Respondent's Summary Judgment on the main cause, even considered this problem.[4] Hence, the trial

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[4]Footnote 3 of the Record, at page 128 thereof, indicates that the Court of Appeals failed to consider Petitioner's oral argument before it on this very point, and the court is further incorrect in stating that "it is apparent that it was not pressed in the district court." It was definitely argued in both courts.

court, in disposing of the various issues raised by the pleadings of Petitioner and Respondent in the trial court below, in such "summary" fashion, has completely left out of its two judgments, a matter which was clearly in dispute between the two parties below, and which is of vital importance to both of them.

Therefore, the Judgments granted below are not only *improper* in failing to afford an opportunity to Petitioner and Respondent to settle the issues of fact between them, apart from the deed; but have proved also to be *inadequate* judgments in that they do not completely decide the matters of *law* at issue between them under the deed itself. Therefore, the two judgments granted to Respondent below were not only improper in narrowing the issues in dispute between Petitioner and Respondent down to a "mere matter of law" in the words of Respondent's brief, but they were also inadequate in that they do not even determine all of the matters raised by that "mere matter of law."[5]

And, what of the District Court's "piecemeal" method of disposing of the issues before it in this case—of sundering inextricably interrelated pleadings so as to find a "failure to state a claim upon which relief" could be granted?

Did the District Court propose to justify its first judgment granting Respondent's motion to dismiss Petitioner's Amended Counter-Claim under Federal Rules of

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[5]That this is improper judicial procedure, see footnote 7, *infra*.

Civil Procedure, Amended Rule 13(i)?[6] That rule justifies separate *"trials"* for counter-claims [Appendix, p. 4]. Is a motion to dismiss, a "trial"? Petitioner thinks not.

Assuming a hearing on a motion to dismiss *is* a "trial," then Rule 13(i), as amended, authorized separate trial and judgment on the counterclaim: "in accordance with the terms of Rule 54(b)."

And Rule 54(b), as amended, states in part: ". . . the court may direct the entry of a final judgment upon one or more but less than all of the claims *only upon an express determination* that there *is not just reason for delay*. . . ." [Appendix, p. 4.]

The District Court made *no such express determination*. It heard the motion for dismissal of the Counterclaim separately; it entered a final judgment thereon; and, then, while a timely appeal was pending from that judgment, it held a second hearing on the motion for summary judgment on the main cause, excluded the issues raised by the pleadings dismissed by the first judgment on the counter-claim, and granted the motion for summary judgment against Petitioner on its answer alone—completely ignoring the necessity of reading Rule 56 with Rule 8(c) which requires the trial court to include such an affirmative defense as an estoppel, though pleaded erroneously as a counter-claim, as a defense to the complaint.

Hence, the motion for summary judgment ignored the effect of Rule 8(c).

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[6]It is interesting to note that under amended Rule 12(b) a motion to dismiss for failure to state a claim upon which relief can be granted, the stated reason of the District Court in the instant case [R. 87], when supported by affidavits, is to be treated as a motion for summary judgment. And, if there is *any doubt* as to the facts, such motion should be *denied*. *American Machine and Metals, Inc. v. DeBothezat Impeller Co., Inc.*, 8 F. R. D. 324 (D. C., S. D. N. Y., 1948).

It also came as a result of a misapplication of the purpose of separate trial procedure under Rule 13(i), in that such rule authorizes separate trials only in accordance with Rule 54(b), and that rule requires an *express determination that there is no just* reason for delay. The trial court made no such express determination.[7]

Furthermore, Rules 13(i) and 54(b) may not become operative without considering Rule 42(b) [Appendix, p. 4].

Rule 42(b) authorizes separate trials, ". . . in furtherance of convenience or to avoid prejudice . . ."

Presumably, the trial court's action herein was *not* "to avoid prejudice!"

And, Petitioner strenuously contends, the words: "in furtherance of convenience" of Rule 42(b) does *not* mean the indiscriminate "convenience" of the judge or one of the contending parties. It *does* mean the furthering of the ends of justice by giving the trial judge, in a proper case, the discretion separately to consider multiple issues raised by complicated pleadings, particularly where there are numerous parties. *Container Co. v. Carpenter Container Corp.*, 9 F. R. D. 89 (D. C. D. Del., 1949). This is not such a proper case; and, if so, the discretion was improperly exercised.

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[7]Thus, the purposes of Rules 54(b) and Rule 56 are cogently expressed in *Coffman v. Federal Laboratories, Inc.*, 171 F. 2d 94 (C. A. 3rd, 1948), where it is held that Rule 54(b) contemplates the entry of a judgment on less than all of the claims involved in an action *only* where there are different occurrences or transactions which form the bases of *separate* units of judicial action. Here, there is one set of occurrences and transactions. The *Coffman* case further notes that Rule 56 similarly does not permit entry of summary judgment on a part of a claim.

Therefore, Petitioner contends that:

(1) The Court of Appeals for the Ninth Circuit erred in the construction of the legal effect of the Deed in making the restrictions imposed by Petitioner not binding on Respondent.

(2) The Court of Appeals erred in affirming the decision of the District Court that the pleadings submitted by Petitioner raised no other issues than those raised in the Deed.

(3) The Court of Appeals erred in affirming Judgments of the District Court which failed to dispose of all the matters at issue before it between the parties, and in particular, the matter of the Architectural Committee's fees;

(4) The Court of Appeals erred in affirming the Judgments of the District Court which refused to allow the parties to go to trial on the issue of a contract binding Respondent, apart from the binding effect of the Deed.

(5) The Court of Appeals erred in sanctioning the Dismissal by the District Court of Petitioner's Counter-Claim in a separate Judgment and thus failing thereby, as required by the Federal Rules of Civil Procedure, to include as a part of the Answer, the issues of estoppel therein alleged, as an affirmative defense to Respondent's Complaint.

(6) The Court of Appeals erred in affirming the Judgment of the District Court granting Summary Judgment on the Complaint to Respondent, where there existed disputed issues of material facts as to the existence or non-

existence of such an estoppel as would prevent Respondent from succeeding on its claim.

(7) The Court of Appeals erred in sanctioning the exercise of judicial authority in the District Court which allowed for a piecemeal disposition of the pleadings of litigants before it in direct opposition to the dominant spirit and expressed intent of the Federal Rules of Civil Procedure.

Conclusion.

The improper application by the Federal District Court, and its sanctioning thereof by the Court of Appeals for the Ninth Circuit, of local decisions in regard to Deed restrictions to a wholly new and different legal and factual relationship than those decisions ever purported to control, plus the general importance of a uniform interpretation of the new and different legal and factual relationship which exists between Petitioner and Respondent, both merit the careful attention of this Honorable Court at this time.

The highly improper piecemeal action of the Federal District Court in first dismissing Petitioner's Counter-Claim in order the better to dispose of Petitioner's Answer on Summary Judgment, and its sanctioning therein by the Court of Appeal for the Ninth Circuit, is an arbitrary exercise of judicial authority going beyond the exercise of judicial discretion, to the extent that it amounts to a violation of due process of law which warrants this Honorable Court's immediate intervention herein.

The action of the Federal District Court in granting Respondent's Motion to Dismiss and Motion for Summary Judgment, where the Affidavits in support thereof did not resolve the issues of fact raised therein, raises a grave question as to the uniform application of the Federal Rules of Civil Procedure which this Honorable Court should now answer.[8]

Wherefore, Petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination

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[8]That the *Sartor* case (*infra,* p. 18) is being ignored by about half of the Courts of Appeal Circuits, and that Rule 56, and closely related rules, of the Federal Rules of Civil Procedure, are ***not being uniformly applied*** by the Federal Courts, becomes clearly apparent by reading the numerous conflicting decisions thereon cited in Volume 2, *Federal Rules Digest,* pp. 270-301; *Cumulative Supplement,* January, 1950, pp. 48-55; etc.

The obvious misunderstanding by the Courts of Appeal of the *Sartor* case, and of the effect of Rule 56 and the discretion of the trial judge in regard thereto is pointed up by the differing views of the judges in *Madeirense Do Brasil S/A v. Stalman-Emrick Lumber Co.,* 147 F. 2d 399. The majority opinion (p. 405) and the dissent (p. 405) *both* cite the *Sartor* case as controlling, but reach opposite conclusions as to the intent of Rule 56! The words of the dissent, expressing the view of a number of circuits, are noteworthy. Thus (p. 405): "at least a summary disposition of issues of damage should be on ***evidence which a jury would not be at liberty to disbelieve*** (italics ours) and which would require a directed verdict for the moving party"; and (p. 407) "I think the majority decision (in the *Madeirense* case) is ***unfair*** and creates an unfortunate precedent ***improperly magnifying the power of a trial judge*** (italics ours)."

the full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled in its docket No. 12192, Huntington Palisades Property Owners Corporation, Ltd., Appellant, v. Metropolitan Finance Corporation of California, Appellee; and that the judgment of said court be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated: Los Angeles, California, April 24, 1950.

HUNTINGTON PALISADES PROPERTY OWNERS CORPORATION, LTD.,

By PAUL R. SMITH,

Counsel for Petitioner.

State of California, County of Los Angeles—ss.

Paul R. Smith, being first duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing Petition for Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes them to be true.

PAUL R. SMITH.

Subscribed and sworn to before me this 24th day of April, 1950.

(Seal) DOUGLAS M. FORBES,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires July 6, 1951.

APPENDIX.

Federal Rules of Civil Procedure.

RULE 8. General Rules of Pleading.

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the

grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata,* statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may

also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

RULE 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided

in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

RULE 13. Counterclaim and Cross-Claim.

(i) Separate Trials; Separate Judgment. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

RULE 42. Consolidation; Separate Trials.

(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

RULE 54. Judgments; Costs.

(b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

RULE 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.

It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.